

A Gerbang Alaf Restaurants Sdn Bhd (formerly known as Golden Arches Restaurants Sdn Bhd) v Chai Su Lin & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO Q-02(NCvC)(W)-1056-08 OF 2020
AZIZAH NAWAWI, NANTHA BALAN AND HASHIM HAMZAH JJCA
21 JULY 2023

C *Contract — Termination — franchise agreement ('FA') — Whether termination of FA that allowed respondents to operate McDonald's restaurant was lawful — Whether respondents failed to heed franchise licensor's several reminders to ensure restaurant premises was clean and complied with standards prescribed by McDonald's System — Whether shutting down of restaurant by health authorities for owners/operators to rid the place of rats and cockroaches damaged McDonald's brand and reputation — Whether respondents' repeated failures to ensure cleanliness of premises constituted material breach of FA that entitled franchise licensor to terminate FA forthwith under s 31(3)(d) of Franchise Act 1998*

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E The first respondent ('R1') entered into a franchise agreement ('FA') with the appellant to open a McDonald's restaurant. At the material time, the appellant was authorised by McDonald's Corp to sub-franchise restaurants in Malaysia under the McDonald's System. The second respondent was R1's assignee of all of its rights, title and interest in its agreements with the appellant, including the FA. Some years after the restaurant began operating, the appellant served on the respondents a notice of default of cl 18(b) of the FA, namely, that the respondents had repeatedly failed to maintain and operate the restaurant 'in a good, clean wholesome manner and in compliance with the standards prescribed by the McDonald's System'. It was pointed out in the notice that a cl 18(b) breach was a material breach of the FA which entitled the appellant to terminate the agreement. The notice of default referred to earlier correspondences between the parties relating to the respondents' failure to maintain cleanliness in the restaurant which had resulted in rat and cockroach infestation and led to health officers ordering the restaurant to be closed until necessary remedial measures had been taken. The notice of default gave advance notice to the respondents that in view of their breaches of cl 18(b), the appellant could at any time terminate the FA forthwith pursuant to s 31(3)(d) of the Franchise Act 1998. As it turned out, the appellant did terminate the FA with immediate effect causing the respondents to sue for a declaration that the termination was wrongful, null and void and for damages. Asserting that the termination was lawful, the appellant counterclaimed against the respondents for general and special damages. Following a trial of the suit, the High Court decided in favour of the respondents. The instant appeal was against that decision.

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Held, unanimously allowing the appeal, setting aside the High Court's decision, allowing the appellant's counterclaim and ordering damages to be assessed:

- (1) The trial judge came to a plainly wrong decision based on a misappreciation of the evidence (see para 50). A
- (2) The appellant's notice of termination referred to the notice of default as well as earlier correspondences and notices between the parties. When those documents were viewed objectively, the court was satisfied that they constituted sufficient notice to the respondents as to the reason for the termination of the FA. The trial judge wrongly held that there was no proper notice or particulars given by the appellant in its notice of termination. There was no need for the appellant to specify in great detail the reasons for the termination since the defaulting event was already communicated through the correspondences between the parties. The respondents always knew about the breaches and were warned of the consequences (see paras 16, 23 & 26–27). B
- (3) The trial judge wrongly came to the conclusion that there was no evidence that the respondents had repeatedly breached cl 18(b) of the FA. Based on all the evidence adduced at the trial, the trial judge wrongly found that there was never any pest infestation or repeated breaches on the part of the respondents in complying with the FA despite ample evidence that showed otherwise (see paras 31–46). C
- (4) The trial judge erred in holding that the appellant could not rely upon s 31(3)(d) of the Franchise Act 1998 to terminate the FA since the respondents had complied with the appellant's requests and remedied previous breaches or failures such that there was no longer 'good cause' under s 31(3)(d) for the FA to be terminated and that it could not be said that there were 'repeated failures to comply'. The fact that a failure to comply or a breach of the terms of the FA had been remedied did not extinguish the fact that there was a failure to comply or a breach in the first place. If the failure to comply or the breach was repeated, even though the earlier breach had been remedied, the repetitive nature constituted a repeated breach of the FA. Section 31(3)(d) of the Franchise Act catered to such circumstances. Hence, whether or not the failure to comply or the breach had been remedied was irrelevant to the termination of the FA under s 31(3)(d). To hold otherwise would defeat the objective of the provision (see paras 47–49). D

[Bahasa Malaysia summary]

Responden pertama ('R1') memasuki perjanjian francais ('PJ') dengan perayu untuk membuka restoran McDonald's. Pada masa material, perayu telah diberi kuasa oleh McDonald's Corp untuk sub-francais restoran di Malaysia di bawah Sistem McDonald's. Responden kedua adalah pemegang serah hak R1 atas

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- A kesemua haknya, hak milik dan kepentingannya dalam perjanjiannya dengan perayu, termasuk PJ. Beberapa tahun selepas restoran tersebut mula beroperasi, perayu menyampaikan kepada responden notis keingkaran klausa 18(b) PJ, iaitu, bahawa responden telah berulang kali gagal menyelenggara dan mengendalikan restoran tersebut 'dengan cara yang baik, bersih dan sihat dan
- B mematuhi piawaian yang ditetapkan oleh Sistem McDonald's. Ianya telah ditegaskan dalam notis tersebut bahawa pelanggaran klausa 18(b) adalah pelanggaran material PJ yang memberi hak kepada perayu untuk menamatkan perjanjian. Notis keingkaran tersebut merujuk kepada surat-menyurat awal antara pihak berkaitan kegagalan responden menjaga kebersihan di restoran
- C yang telah mengakibatkan pembiakan tikus dan lipas dan menyebabkan pegawai kesihatan mengarahkan restoran tersebut ditutup sehingga langkah pemulihan yang diperlukan telah diambil. Notis keingkaran memberikan notis awalan kepada responden bahawa memandangkan pelanggaran klausa 18(b), perayu boleh pada bila-bila masa menamatkan PJ dengan serta-merta menurut s 31(3)(d) Akta Francais 1998. Akhirnya, perayu memang telah menamatkan PJ berkuat kuasa serta merta menyebabkan responden menyaman untuk satu deklarasi bahawa penamatan tersebut adalah salah, terbatal dan tidak sah dan untuk ganti rugi. Menegaskan bahawa penamatan tersebut adalah sah, perayu menuntut balas terhadap responden untuk ganti rugi am dan khas. Selepas perbincaraan tindakan tersebut, Mahkamah Tinggi memutuskan memihak kepada responden. Rayuan semasa adalah terhadap keputusan tersebut.

- Diputuskan,** sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, membenarkan tuntutan balas perayu dan memerintahkan ganti rugi untuk ditaksirkan:
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- (1) Hakim bicara membuat keputusan yang jelas salah berdasarkan salah mengambilkira keterangan (lihat perenggan 50).
- G (2) Notis penamatan perayu merujuk kepada notis keingkaran serta surat-menyurat dan notis terdahulu antara pihak-pihak. Apabila dokumen tersebut dilihat secara objektif, mahkamah berpuas hati bahawa ia telah memberikan notis yang mencukupi kepada responden tentang sebab penamatan PJ. Hakim bicara secara salah berpendapat bahawa tiada notis atau butir-butir yang sepatutnya diberikan oleh perayu dalam notis penamatannya. Tidak ada keperluan bagi perayu untuk menyatakan dengan terperinci sebab-sebab penamatan tersebut kerana peristiwa ingkar telah dimaklumkan melalui surat-menyurat antara pihak-pihak. Responden sentiasa mengetahui tentang pelanggaran dan diberi amaran tentang akibatnya (lihat perenggan 16, 23 & 26–27).
- I (3) Hakim bicara secara salah membuat kesimpulan bahawa tidak ada keterangan bahawa responden telah berulang kali melanggar klausa 18(b) PJ. Berdasarkan semua keterangan yang dikemukakan

semasa perbicaraan, hakim bicara secara salah memutuskan bahawa tidak pernah ada serangan perosak atau pelanggaran berulang di pihak responden dalam mematuhi FA walaupun terdapat banyak keterangan yang menunjukkan sebaliknya (lihat perenggan 31–46).

- (4) Hakim bicara terkhilaf apabila memutuskan bahawa perayu tidak boleh bergantung kepada s 31(3)(d) Akta Francais 1998 untuk menamatkan FA kerana responden telah mematuhi permintaan perayu dan membetulkan pelanggaran atau kegagalan terdahulu sehingga tiada lagi ‘sebab yang baik’ di bawah s 31(3)(d) untuk PJ ditamatkan dan ia tidak boleh dikatakan bahawa terdapat ‘kegagalan berulang untuk mematuhi’. Fakta bahawa kegagalan untuk mematuhi atau pelanggaran syarat FA telah dipulihkan tidak memadamkan fakta bahawa terdapat kegagalan untuk mematuhi atau pelanggaran pada mulanya. Jika kegagalan untuk mematuhi atau pelanggaran tersebut berulang, walaupun pelanggaran sebelumnya telah dipulihkan, sifat berulang tersebut terjumlah kepada pelanggaran berulang terhadap FA. Seksyen 31(3)(d) Akta Francais memenuhi keadaan sedemikian. Oleh itu, sama ada kegagalan untuk mematuhi atau pelanggaran atau tidak telah dipulihkan adalah tidak relevan dengan penamatan FA di bawah s 31(3)(d). Dengan memutuskan sebaliknya akan menggagalkan objektif peruntukan tersebut (lihat perenggan 47–49).]

Cases referred to

- Majlis Bandaraya Pulau Pinang v Mohd Noor Sirajajudeen & Anor* [2018] 5 MLJ 349; [2019] 3 CLJ 770, FC (folld)
Mohd Nahar bin Abu Bakar v PP [2014] 2 MLJ 373; [2013] 5 CLJ 977, CA (refd)
Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401; [1995] 1 CLJ 761, FC (dstd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)

Legislation referred to

- Food Act 1983 s 11
 Franchise Act 1998 s 31(3)(d)

Appeal from: *Chai Su Lin & Anor v Gerbang Alaf Restaurants Sdn Bhd (formerly known as Golden Arches Restaurants Sdn Bhd)* [2021] MLJU 1336 (High Court, Kuching)

Mekanda Singh Sandhu (with Satinder Singh Sandhu, Libat Langub, Ganit Libat and Pearly Tew Siew Wei) (Dr Yaacob & Ismail) for the appellant.
Shirleen Ong (with Alvin Yong Sze Lung) (Alvin Yong Advocates) for the respondent.

A Hashim Hamzah JCA:

INTRODUCTION

B [1] For ease of reference, parties to the present appeal shall be referred to as they were before the High Court below for Civil Suit No KCH-22NCvC-7-2 of 2018.

C [2] The defendant in the present case is a company incorporated in Malaysia, having its principal place of business at Level 6, Bangunan TH, No 3, Damansara Uptown, Jalan SS21/39, Petaling Jaya, Selangor. The defendant was granted the right to sub-franchise restaurants in Malaysia under the McDonald's System according to the terms of a master franchise from McDonald's Corp.

D [3] Following the first plaintiff's intention to acquire the franchising rights in McDonald's Restaurant, the defendant entered into various agreements with the first plaintiff on 13 February 2007. These agreements are the franchise agreement ('FA'), the operator's tenancy agreement ('OTA'), and the sale and purchase agreement ('SPA').

E [4] On the same day, the first plaintiff had assigned all her rights, titles and interests in the FA, OTA and SPA to the second plaintiff through a deed of assignment.

F [5] A dispute arose between the parties in 2017 when the plaintiffs were allegedly found to have repeatedly failed to maintain and operate the McDonald's restaurant in a good, clean and wholesome manner. According to the defendant, the plaintiffs were in repeated material breach of cl 18(b) of the FA. This issue shall be dealt with later in this judgment.

G [6] Consequently, on 26 December 2017, the defendant issued a notice of termination ('notice of termination') under s 31(3)(d) of the Franchise Act 1998 ('the Act 590') to terminate the FA with immediate effect on the ground that the plaintiffs had repeatedly breached the FA.

H [7] Dissatisfied, the plaintiffs filed this action before the High Court, claiming the following reliefs, namely:

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- (a) a declaration that the termination notice is wrongful, null and void;
 - (b) a refund of the security deposit in the sum of RM74,517 paid by the first plaintiff to the defendant under the OTA;
 - (c) damages for wrongful termination;

(d) damages for conversion of the first plaintiff's food shop (fast food) license issued by the Majlis Bandaraya Kuching Selatan ('MBKS') and the second plaintiff's business license; and

(e) interest and cost.

[8] On the other hand, the defendant contended that the termination of the FA was lawful and filed a counterclaim against the plaintiffs for general and special damages.

[9] The matter went for a full trial and was jointly tried with two other civil suits, ie, Civil Suit No KCH-22NCvC-11-3 of 2018 and Civil Suit No KCH-22NCvC-27-6 of 2019. It was agreed between the parties that these civil suits were to proceed on the issue of liability first.

[10] On 3 August 2020, after a full trial, the learned trial judge decided that the plaintiffs had proven their case against the defendant on the balance of probabilities and that the notice of termination by the defendant to the plaintiffs was wrongful, null and void. As such, the plaintiffs' claim against the defendant was allowed.

[11] Aggrieved with the said decision, the defendant filed this appeal.

THE DEFENDANT'S MEMORANDUM OF APPEAL

[12] In the memorandum of appeal, the defendant raised 15 issues to be determined in this appeal. Before us, the defendant's submission was focused on the following issues, namely whether the learned trial judge had erred both in fact and in law:

(a) in holding that there were no repeated failures on the part of the plaintiffs to comply with cl 18(b) of the FA;

(b) in holding that the defendant had no good cause to terminate the FA under s 31(3)(d) of the Act 590 without the requirement of notice and opportunity to remedy the breach;

(c) in holding that there was no proper notice or particulars given by the defendant to the plaintiffs in the notice of termination;

(d) in the interpretation and application of s 31(3)(d) of the Act 590 to the facts of the case; and

(e) in holding that the notice of termination issued by the defendant to the plaintiffs was wrongful, null and void and that the plaintiffs were entitled to the judgment granted.

A OUR ANALYSIS AND FINDINGS

[13] First and foremost, the relevant part of the defendant's notice of termination to the plaintiffs reads:

- B 1. *We refer to the above matter, our earlier notice of default dated 15 December 2017, correspondences and notices.*
- C 2. Please be informed that in view of the repeated breaches of the said provision of the franchise agreement by you, *we hereby terminate the franchise agreement and forthwith pursuant to Section 31(3)(d) of the Franchise Act, 1998 (ie repeatedly fails to comply with the terms of the franchise agreement)* without prejudice to our rights to exercise all other rights and remedies against you.

[14] It can be seen from the defendant's notice of termination that the FA was terminated pursuant to s 31(3)(d) of the Act 590, which states:

- D Section 31 Termination of franchise agreement.
- (1) *No franchisor or franchisee shall terminate a franchise agreement before the expiration date except for good cause as provided in subsections (2) and (3).*
- (2) 'Good cause' shall include, but is not limited to —
- E (a) the failure of franchisor or a franchisee to comply with any terms of the franchise agreement or any other relevant agreement entered into between the franchisor and franchisee; and
- F (b) the failure of franchisor or the franchisee to remedy the breach committed by him or any of his employees within the period stated in a written notice given by the franchisor, which shall not be less than fourteen days, for the breach to be remedied.
- (3) 'Good cause' shall include, but *without the requirement of notice and an opportunity to remedy the breach*, circumstances in which the franchisor or franchisee —
- G (a) makes an assignment of the franchise rights for the benefit of creditors or a similar disposition of the assets of the franchise to any other person;
- (aa) becomes bankrupt or insolvent;
- (b) voluntarily abandons the franchised business;
- (c) is convicted of a criminal offence which substantially impairs the goodwill associated with the franchisor's mark or other intellectual property; or
- H (d) *repeatedly fails to comply with the terms of the franchise agreement.*

- [15] In short, under s 31(3)(d) of the Act 590, the defendant may terminate the FA for good cause, without the requirement of notice and an opportunity to remedy the breach, if the plaintiffs had repeatedly failed to comply with the terms of the FA.
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[16] The defendant's notice of termination did not specify which terms of the FA that the plaintiffs had repeatedly failed to comply with. Be that as it may,

the notice of termination did refer to a notice of default dated 15 December 2017 ('notice of default'), earlier correspondence and notice. A

[17] In the defendant's notice of default issued to the plaintiff, it was stated, among others, as follows: B

Dear Sirs,

Re: Notice of Default

Repeated failure or breaches of QSC standard under the franchise agreement McDonald's restaurant at Ground Floor and First Floor, Lot 2719 and Ground Floor Lot 2720, Jalan Tun Ahmad Zaidi Adruce, 93250 Kuching, Sarawak ('Demised Premises') C

1. We refer to the above matter and our earlier correspondences.
2. We have been advised that pursuant to an inspection conducted by the Ministry of Health on 13 December 2017, you have been issued with the following regulatory notices — D
 - (i) Notis Perintah Tutup Premis Makanan;
 - (ii) Arahan Pembersihan Tindakan Pembetulan; and
 - (iii) Notis Memerintahkan Kehadiran di Mahkamah all dated 13 December 2017. E
3. The above notices were issued due to your *failure to maintain the cleanliness of the above Demised Premises which have resulted in rat and cockroach infestation, details of which are well within your knowledge.* F
4. Please note that the above incident has also reached the public domain when it was reported in the media on 14 December 2017, thus substantially impair the goodwill associated with McDonald's reputation, brand and marks.
5. *Your repeated failures to maintain cleanliness of the Demised Premises constituted a material breach pursuant to paragraph 18 of the franchise agreement which entitles us to terminate the franchise agreement. Paragraph 18(b) of the franchise agreement states the breach as failure 'to maintain and operate the restaurants in good, clean, wholesome manner and in compliance with the standard procedure by the McDonald's System.* G H
6. In view of the repeated breaches of the said provision of the franchise agreement by you, please take note that we hereby reserve the right to terminate the franchise agreement pursuant to Section 31(3)(d) of the Franchise Act 1998. This will be without prejudice to all out other rights and remedies against you. I

[18] Based on the evidence, the relevant correspondence includes:

- A** (a) the defendant's letter dated 22 March 2017 informing the plaintiffs on the outcome of the unannounced pest audit dated 24 February 2017 ('the first UPA') in which the defendant also sought clarification and action plans from the plaintiffs;
- B** (b) the defendant's letter dated 31 March 2017 reminding the plaintiffs to revert to the above letter;
- (c) the notice to show cause dated 13 June 2017 ('notice to show cause') informing the plaintiffs of their breach of cl 18(b) of the FA following the failed brand standard visit ('BSV') conducted by DW2 and the
- C** unannounced pest audit dated 24 May 2017 ('the second UPA'); and
- (d) the notice of default.

D [19] Regardless of the above, the learned trial judge still held that the defendant's notice of termination was wrong in law due to the lack of details. In so holding, the learned trial judge referred to *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401; [1995] 1 CLJ 761 (FC).

E [20] However, we agree with the defendant that the facts in *Perkayuan OKS No 2* can be distinguished from those in the present case.

F [21] In *Perkayuan OKS No2*, the respondent's notice of termination alleged that the appellant had 'on various occasions assigned its rights under the main agreement to third parties without the written consent of the respondent in breach of cl 18 of the main agreement'. The respondent subsequently terminated the main agreement.

G [22] The Federal Court through Hj Lamin bin Hj Mohd Yunus PCA (as His Lordship then was) held:

H We agree that the '*various occasions*' on which the appellant/plaintiff was alleged to have assigned and/or transferred its rights to third parties *lacked details. The identity of the third parties* to whom the rights were allegedly assigned and/or transferred *was not particularised*.

I [23] In the present case, when the notice of default, correspondence and notice between the parties were viewed objectively, we are satisfied that they constitute sufficient notice to the plaintiffs as to the reason for the termination of the FA.

[24] In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 (FC), Zainun Ali FCJ (as Her Ladyship then was) in delivering the judgment of the Federal Court, held as follows:

[97] However, in our view *the test to ascertain whether the communication of reasons in the notice is necessary (or conversely, superfluous) is an objective rather than a subjective one.* To draw an analogy from deciding whether or not repudiatory breach has in fact occurred, the courts look at whether or not repudiatory breach has occurred by an objective standard and will disregard the subjective belief of the party liable for breach and any of its agents. There is no reason why it should not do the same with regards notice of the reasons for termination. In our view, it is insufficient that the respondent contends to the effect that the appellant has a moment of epiphany upon receipt of the notice of termination and henceforth understands and appreciates the subjective reasons of the respondent for terminating the contract. This is not to be understood as meaning that the standard for breach is that which is subjective to the respondent, for breach is also determined objectively. Similarly this does not mean that the respondent may under no circumstances rely upon reasons which exist at the time of termination or notice apart from those that are disclosed, though this is subject to exceptions. Instead, one must appreciate that the reasons for termination are the respondent's and the respondent's only, and unless actual (or even constructive) notice of those reasons can be demonstrated, a termination notice with reasons must be provided should the contract, properly construed, require them. *In the present case, one only has to ask if the reasonable person observing the exchange between the appellant and the respondent, having only the knowledge which they shared in common, would be able to understand and identify the reasons for which the respondent was claiming termination of the contract.* In our view, the mere intonation of the letter does not suffice. Barring further evidence which demonstrates that the appellant should have known but wilfully chose not to know, the facts of the present case proffer no sufficient explanation. Upon reflection, the question of 'whether notice of reasons, when required by contract, is satisfied by an objective or subjective standard' is of enough significance to the present case (as it decided the question of the validity of termination in the Court of Appeal) and to public policy to have been properly considered as a question of law in the appeal.

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[25] We also agree with Her Ladyship Tengku Maimun Tuan Mat JCA (now CJ) in delivering the judgment for this court in *Majlis Bandaraya Pulau Pinang v Mohd Noor Sirajajudeen & Anor* [2018] 5 MLJ 349; [2019] 3 CLJ 770 (CA) as follows:

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[51] With respect, the learned JC erred in concluding that simply because no reasons were given in the notice of termination that renders the notice of termination invalid. *The question that ought to be considered in our view is not so much whether the notice of termination states any reason but whether the plaintiffs had notice that the reason for termination of the agreement is the non-payment of the monthly appointment fee.*

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[65] We accept that cl 20.2 of the PMA requires the defendant to inform the plaintiffs of the reason for the termination. The notice of termination dated 4 May 2012 could have been better worded. *However, on the factual matrix of this case, we entertain no doubt that the plaintiffs had actual notice of the reason for termination of the agreement ie, that the termination was due to the non-payment of the monthly appointment fee. From the previous correspondence, namely by letters dated 22 August*

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- A 2011 and 7 October 2011, the plaintiffs were specifically informed of the defaulting event and were given time to remedy the situation ...
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- B [68] Although the notice itself did not state in so many words the reason for the termination, *the fact remains that the plaintiffs knew that non-payment of the monthly appointment fee would trigger an event of default and that the defendant will exercise its right to terminate the plaintiffs' appointment.* Further, from the date of receipt of the notice of termination until the date the termination was to take effect which was well within the required period for the plaintiffs to cure the remedy, the plaintiffs had every opportunity to pay the sums due to the defendant, which they did not.
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- [26] Based on the above, we agree with the defendant that the learned trial judge was wrong in holding that there was no proper notice or particulars given by the defendant to the plaintiffs in the notice of termination.
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- [27] In addition, we are of the considered view that there was no need for the defendant to specify in great detail the reasons for the termination of the FA since the defaulting event was already communicated through the correspondence between the parties. The plaintiffs always knew about the breaches and were warned of the consequences.
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- [28] Next, as can be seen in the notice of default, correspondence and notice between the parties, the plaintiffs were alleged to have repeatedly breached cl 18(b) of the FA, which states:
- F 18. Material Breach. *The parties agree that the happening of any of the following events shall constitute a material breach of this Franchise and violate the essence of Licensee obligations, and without prejudice to any of its other rights or remedies at law or in equity, Licensor at its own election may terminate this Franchise upon the happening of the following events:*
- G ...
- (b) *Licensee shall fail to maintain and operates the restaurants in a good, clean, wholesome manner and in compliance with the standards prescribed by the McDonald's System.*
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- [29] To determine whether the termination of the FA by the defendant was lawful, the learned trial judge must determine whether there was evidence to show that the plaintiffs had repeatedly failed to comply with cl 18(b) of the FA.
- I [30] On this issue, the learned trial judge found that:
37. I am in agreement with plaintiff's contention that the defendant has grounded on the *termination of the franchise agreement based on repeated failures and that the defendant did not however adduce any evidence for these repeated failures except for what the defendant alleged as pest infestation which I find, is not credible.*

[31] In the present case, the defendant submitted that the learned trial judge was wrong in holding that there was no evidence of repeated failures on the part of the plaintiffs to comply with cl 18(b) of the FA. We agree with the defendant for the following reasons. A

[32] First, there is evidence of DW2, the defendant's Manager of the Risk Management Department. He was the one who prepared the unannounced pest audit reports dated 24 February 2017 and 24 May 2017 ('the pest audit reports'), inclusive of the photographs which showed the cleanliness issues in the restaurants. The pest audit reports disclose that: B

- (a) the restaurants was subject to pest infestation and potential pest-related risks; C
- (b) there were food safety risks to the customers;
- (c) there were safety risks to the customers and the restaurants's employees; D
- and
- (d) the restaurants has been infested by pests.

[33] We agree with the defendant that the pest audit reports indicate that the restaurants was suffering from cleanliness issues at least on two occasions, ie, during the first UPA and the second UPA. E

[34] However, the learned trial judge found the pest audit reports to be not credible. He did not attach any weight to the said reports. He preferred the Rentokil service reports (from January to December 2017) prepared by Rentokil Initial (M) Sdn Bhd ('Rentokil') engaged by the second plaintiff since 1 September 2010 over the pest audit reports. To summarise, the learned trial judge found that: F

- (a) the Rentokil service reports did not show that there was any pest infestation, mainly rats and cockroaches infestation, during the period; and G
- (b) if there was any infestation, it was only common ants not recorded in DW2's second pest audit report. H

[35] In short, the learned trial judge found that the Rentokil service reports did not support DW2's findings in the pest audit reports. This is one of the main reasons the learned trial judge found the pest audit reports to be unreliable. I

[36] However, we agree with the defendant that the learned trial judge had erred in his findings above for the following reasons:

- A (a) the learned trial judge did not provide any cogent reason why DW2's evidence and pest audit reports were not credible. The evidence relating to the repeated failures to observe cleanliness was captured in photographs and annexed to the pest audit reports. There was nothing to show that the photographs had been fabricated or unauthentic. The
- B unannounced pest audits were even conducted in the presence of the plaintiffs' representatives;
- C (b) the learned trial judge found that none of the Rentokil service reports showed any infestation of cockroaches and rats. However, the report dated 24 October 2017 (exh P6) clearly showed other pests, such as flies, ants, cockroaches and rats. This was confirmed by PW3 himself during cross-examination;
- D (c) the learned trial judge considered that DW2's pest audit reports did not show that there were ants and flies as stated in the Rentokil service reports. On this, we agree with the defendant that the unannounced pest audits done by DW2 were not carried out simultaneously with Rentokil's. Naturally, the outcome would be different. The issue remains whether the plaintiffs had repeatedly failed to maintain the restaurants in a clean and wholesome manner; and
- E (d) the learned trial judge's observed that DW2 was being ambiguous with his answer by referring to Rentokil service reports, which stated, 'keep it clean always'. PW3, who prepared the report, gave evidence that:
- F Q162: Do you agree that in most of the various service reports you had made in respect of your routine treatment at Forest Café Kuching Sdn Bhd *you had recommended the customer to keep the premises clean at all time*, isn't that correct?
- A: Yes.
- G Q163: Do you agree that the reason why you had recommended Forest Café to keep the premises clean is that *if the premises was clean, they will be less risk of pest issues at the premise*, do you agree?
- A: Yes.
- H Q164: *From your routine treatment at the premises of Forest Café Kuching Sdn Bhd you had found the place to be not clean*, do you agree?
- A: Yes.
- I [37] The learned trial judge also failed to consider the evidence given by PW2 and PW3 (who had prepared their respective Rentokil service reports) that there were pest infestation issues in the restaurants. During cross-examination, PW3 agreed that the service reports he prepared showed some pest problems at the restaurants and that it was not in a clean condition when he conducted his service. PW3 also agreed during cross-examination that

the restaurants had continuously suffered from pest issues and that no proper pest proofing was done. DW4, in fact, corroborated PW3's evidence.

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[38] Second, is the evidence of DW1, the defendant's operation consultant/business consultant. He provides consultation on matters related to the operations and business of McDonald's Restaurants, such as maintaining quality, service and cleanliness ('QSC') based on McDonald's standards, guidance on people development, operational and business planning.

B

[39] DW1 gave evidence that he conducted a brand standard visit ('BSV') on 19 May 2017. He also prepared a report regarding the visit. The primary purpose of the BSV was to review the condition and operation of the restaurants against the standards prescribed by McDonald's in the FA.

C

[40] The visit was conducted in the presence of the plaintiffs' operation manager and the plaintiffs' representative. The outcome of the BSV was communicated to the first plaintiff through an email dated 30 May 2017. The report was also attached therein. The pertinent findings of the BSV were that the kitchen area was very disorganised, there was a lack of detailed cleanliness on the equipment and poor overall cleanliness. Photographs taken during the visit were also exhibited in the report.

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[41] Third, is the evidence of PW6, the second plaintiff's manager at the material time. She was subpoenaed to give evidence in court. During cross-examination, PW6 admitted that there were cockroaches and rats in the restaurants before 13 December 2017. PW6 also confirmed that there were complaints from the customers that they saw rats and cockroaches within the vicinity of the restaurants.

F

[42] PW6 was treated as an interested witness by the learned trial judge merely because PW6 gave evidence that he had reported the sighting of the rats to the first plaintiff, but the first plaintiff denied having been so informed.

G

[43] We are of the view that the learned trial judge had misconstrued the evidence of PW6. PW6 gave evidence that the team management was informed of the sighting. According to PW6, the team management consisted of Peter, Norlia, Nazim and Alif. There was nothing in the evidence to show that the first plaintiff was a part of the team management. Therefore, the learned trial judge treated PW6 as an interested witness without legal basis. There was nothing in the evidence to show that PW6 had any direct interest in the result of this litigation (see *Mohd Nahar bin Abu Bakar v Public Prosecutor* [2014] 2 MLJ 373; [2013] 5 CLJ 977 (CA) at para 28 of the judgment). In the present case, PW6 was called by the plaintiffs, and her evidence was never impeached.

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A [44] Fourth, the learned trial judge relied on a service report prepared by Intertek, a company specialising in quality and safety assurance which the defendant appointed as a third-party auditor. The learned trial judge only referred to the part of Intertek Visit Reports where the ‘food safety’ was reported as ‘acceptable’ but did not consider another part of the report which
B stated, ‘one fly was sighted at area of food wrapping table, one cockroach was sighted on the kitchen floor and has (SIC) immediately removed’.

C [45] Ultimately, the restaurants was ordered to be closed under s 11 of the Food Act 1983 after an inspection by the Ministry of Health, during which cockroaches and rat droppings were found in the restaurants. We agree with the defendant that even though the restaurants was allowed to reopen the following day, this does not negate the presence of cockroaches and rats in the restaurants in the first place.

D [46] Based on all of the above, we are of the considered view that the learned trial judge had erred in his findings that there was never any pest infestation or repeated breaches on the part of the plaintiffs to comply with the franchise agreement in circumstances where there was ample evidence adduced to show
E otherwise.

F [47] The next issue is whether the learned trial judge erred in the interpretation and application of s 31(3)(d) of the Act 590 to the facts of the case. The learned trial judge was of the opinion that since the plaintiffs have complied with the defendant’s requests and remedied the previous breaches or failures, such previous breaches or failures cannot constitute valid grounds for termination. The learned trial judge opined:

G 58. Based on the above evidences and applying the relevant provisions of the Franchisee Act 1995, I find that the defendant has not shown to this court that they have ‘good cause’ as stipulated in s 31(3)(d) of the Franchise Act 1995 to terminate the franchise agreement or that the plaintiffs have ‘repeatedly fails to comply’ with the terms of the franchise agreement. *I find that the fact that efforts to remedy are made by the plaintiffs cannot amount to ‘repeated failures’.* Further I find that *since the plaintiffs have complied with and remedied the previous breaches and/or failures, such previous breaches and/or failures cannot constitute valid grounds for termination.* This
H is to be distinguished from situations where a party has refused or failed to remedy breaches or failures repeatedly.

I 59. Thus the defendant’s reliance on s 31(3) (d) of the Franchise Act 1995 is thus erroneous and the termination is thus wrongful.

[48] We disagree with the learned trial judge.

[49] In our view, the fact that a failure to comply or a breach of the terms of the FA has been remedied does not extinguish the fact that there was a failure

to comply or a breach in the first place. If the failure to comply or the breach is repeated, even though the earlier breach has been remedied, the repetitive nature constitutes a repeated breach of the FA. Section 31(3)(d) of the Act 590 caters to such circumstances. Hence, whether the failure or the breach has been remedied or not is irrelevant to the termination of the FA under s 31(3)(d) of the Act 590. Indeed, to hold otherwise would defeat the objective of this provision.

CONCLUSION

[50] In conclusion, based on all of the above reasons, we found that the learned trial judge's decision was plainly wrong, and there are merits to this appeal. We are of the view that there was a misappreciation of evidence resulting in the misdirection by the learned trial judge.

[51] Therefore, we allow this appeal with cost and set aside the order of the learned trial judge. Consequently, the defendant's counterclaim is allowed, and damages are to be assessed.

Appeal allowed; High Court's decision set aside and appellant's counterclaim and ordering damages to be assessed allowed.

Reported by Ashok Kumar

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